Nos. 22,399 and 22,399-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and SANDRA STAMPER,

Appellees.

Appeal From the United States District Court,
Central District of California.

BRIEF FOR APPELLEE SANDRA STAMPER.

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Preliminary Statement.

In a memorandum after trial by an advisory jury, the trial court, Honorable Francis C. Whelan, U. S. District Judge, found that claimant Sandra Stamper was, and is, entitled to damages for her personal injuries in the sum of $140,000.00 from the petitioners, Pearson and Heiser. With respect to Pearson's appeal from the interlocutory judgment of liability in favor of Sandra Stamper and against William A. Pearson and Robert W. Heiser, appellee Sandra Stamper replies to the issues raised by appellant Pearson in his opening brief.

1. THE FINDINGS MADE BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE DISTURBED.

The Supreme Court, in the leading case on the subject has established the doctrine or rule that no greater scope of review is to be exercised by the federal appellate courts in admiralty cases than they may exercise under Rule 52(a) of the Rules of Civil Procedure, and that, consequently, in reviewing a judgment of a trial court sitting without a jury in admiralty, the court of appeals may not set aside the judgment below unless it is clearly erroneous. *Guzman v. Pichirilo,* 369 U.S. 698, 8 L. Ed. 2d 205, 82 S. Ct. 1095; *McAllister v. United States,* 348 U.S. 19, 99 L. Ed. 748, 75 S. Ct. 6.

Under the *McAllister* doctrine which assimilates the scope of review in admiralty to that under Rule 52(a) [*McAllister v. United States,* 348 U.S. 19, 99 L. Ed. 748, 75 S. Ct. 6; *Marrero Morales v. Bull S.S. Co.,* 279 F. 2d 299] the traditional admiralty practice of a trial *de novo* on appeal generally has been held to be no longer applicable or substantially modified or restricted, at least to the extent that the factual determinations embodied in the findings of the trial court will be accepted by the appellate court as final and binding if supported by the record and not clearly erroneous.

In his opening brief appellant's argument includes:

A claim that an impractical and unreasonable standard of care and duty was imposed on Pearson.

A denial that failure by Pearson to see Heiser's lights should have been the basis, in whole or in part, for a finding that Pearson did not keep a proper lookout.

A claim based on conjecture coupled with a denial that even if Pearson had kept a proper lookout he might not or could not have been Heiser.

A claim based on conjecture coupled with a denial that even if Pearson had kept a proper lookout and could have seen or if, in fact, he had seen, Heiser, that Pearson could have taken any steps to avoid the collision.

A claim that the Major and Minor Fault Rule should have been applied as a matter of law.

A. Pearson Owed a Duty to Sandra Stamper to Exercise the Care of a Reasonably Prudent Mariner and to Maintain a Proper Lookout.

(i) Definition of Duty Owed.

Under maritime law, persons in charge of ships or vessels must at all times exercise "due diligence" and "maritime skill" to avoid injury to others, by collision or otherwise. The applicability of this rule to motorboats has been generally recognized. Thus it was expressly referred to in *The Adventuress* (1914), DC Mass., 214 Fed. 834, a case involving a collision between two motorboats, where the court said that it was the duty of a captain or master to exercise the care of a "reasonably prudent mariner", to observe "reasonable care and prudence, not only against present dangers, but against impending perils," and to take "seasonable measures of precaution." In a few instances, the courts have expressed the duty to avoid collision in terms of the particular circumstances of the case.

Thus, with respect to the care required of a lookout, the court in *The Catalina* (1938), CA 9 Cal., 95 F. 2d 283, said that he must exercise the "highest watchful-

ness" and must be in a position "best adapted to decry vessels approaching at the earliest possible moment," applying such criterion to a motorboat which collided with a steamship during a fog. Similarly, in *Stevens v. United States Lines Co.* (1951), CA 1, 187 F. 2d 670, the court said that under the article of the Inland Rules providing that an owner should not be exonerated for "any neglect to keep a proper lookout," a lookout was required in every direction from which danger might reasonably be expected to arise, the quality and diligence of the lookout depending upon the degree and imminence of the danger, such rule being applied to the owner of a cabin cruiser in collision with an overtaking freighter in a busy harbor.

In *The O'Brien Bros.* (1919), CA 2 N.Y., 258 Fed. 614, the court, while holding a tug and a disabled motorboat equally liable for a collision, said that the motorboat owner acted as if the very smallness of his boat, or some privilege inherent in pleasure craft, entitled him to cast all the burdens of avoiding collision on the other vessel, whereas there was no legal distinction, under the rules of navigation, between vessels operated for pleasure and for profit, between large boats and small ones, or those with a numerous crew and those operated by one man. In *White's Estate v. Beauchamp* (1957), 348 Mich. 159; 82 N.W. 2d 472; 63 A.L.R. 2d 340, it was said that the owner of a motorboat had a duty, in its operation, to exercise reasonable care for the safety of his guests and to avoid exposing them unreasonably to danger by increasing the hazards of this method of travel, a failure to observe this duty constituting negligence.

The trial court found that "petitioner Pearson was negligent in failing to keep a proper lookout and such

negligence was the proximate cause of the collision" [Find. 20]. Appellant Pearson urges that failure to keep a proper lookout would be a contributing factor in the collision only if a reasonable standard of care would demand that a proper lookout aboard the Pearson boat could and should have seen Heiser's lights. However, the issue remains whether Pearson maintained a proper lookout in the first instance.

(ii) The Law With Respect to Lookout.

The court found that the collision occurred within the boundaries of the State of California on navigable waters of the United States, to wit, part of the Colorado River [Find. 13]. The Colorado River is navigable. *Arizona v. Colorado,* 298 U.S. 558; 80 L. Ed. 1331; 56 S. Ct. 848. The rules with respect to navigable waters do not affirmatively require a lookout. It is merely stated that nothing in the rules exonerates a party from the consequences of any neglect to keep a proper lookout 33 U.S.C. Sections 147(a) and 221. (Section 221 is known as Article 29 of the Inland and Pilot Rules).

There is no doubt that a party who fails to keep a proper lookout is at fault. *British Columbia Mills Tug & Barge Co. v. Mylroie,* 259 U.S. 1. Even a privileged vessel has no right to take her course with her eyes shut. *The Devonian,* 110 Fed. 588. The ship will be at fault if the lookout fails to see or hear what, if he had given heed, he should have seen or heard. The lookout must be properly stationed and have no other duty. (Law for Yachtsmen, Greeley, p. 25.) If the provision of Article 29 in regard to keeping a proper lookout is negative in form, nothing could be more positive than the obligation as construed by the civil courts and, it might be added, by naval courts and boards.

A lookout has been defined by the federal court as a person who is specially charged with the duty of observing the lights, sounds, echoes, or any obstruction to navigation with that thoroughness which the circumstances permit. *The Tillicum* (1941), Wash., 217 Fed. 976. The words specially charged imply that such person shall have no other duties which detract in any way from the keeping of a proper lookout. Thus it has been held in numerous cases that because the lookout must devote his attention to this duty, the officer of the deck or the helmsman cannot properly serve as lookout. *The Kaga Maru* (Wash. 1927), 18 F. 2d 295; *The Donau* (Wash. 1931), 49 F. 2d 799. Even on a slow moving tug with a tow, the duty is not legally complied with by the officer in charge of navigation keeping a lookout from the pilot house. *The City of Philadelphia* (Pa. 1894), 62 Fed. 617; *The Sea Breeze,* Fed. Cas. #12,572a. Where the captain of a steamer is acting at the same time as pilot and lookout, the vessel has not a proper lookout, and the owners may be liable for the damage caused by such omission. *Bill v. Smith* (1872), 39 Conn. 206; *Dahlmer v. Bay State Dredging & Contracting Co.,* (CCA Mass. 1928), 26 F. 2d 603. A seaman who has been dividing his attention between looking out and reefing sail was held not to be a vigilant lookout. *The Twenty-one Friends* (Pa. 1887), 33 Fed. 190. Where the only two men on the deck of a schooner navigating at night were engaged in taking down sail, it was held that neither one nor both seamen constitued a proper lookout and accordingly the schooner was at fault for colliding with another schooner having the right of way. *The Fannie Hayden* (Me. 1905), 137 Fed. 280.

Many court decisions on the subject indicate that the strict performance referred to means, at least in most circumstances, not only that lookouts shall be free from other duties but that they shall be (1) qualified by a certain amount of experience as seamen, (2) vigilant and alert, (3) properly stationed, and (4) in such numbers as circumstances require in order that the vessel may avoid risk of collision. See The Rules of the Nautical Road, Farwell, pages 357 to 379. In Simplified Rules of the Nautical Road, U. S. Naval Institute, Wills, rules for the prevention of collision are summarized as follows at pages 1 and 2:

> Collisions will be prevented if the following principles are applied: a. The rules of the nautical road, in the light of court interpretations, are always, and fully, complied with. b. A proper lookout is maintained—a lookout is the eyes and ears of the ship—even in the presence of radar. His job is to discover as early as possible the approach of ships and to report that information to the Officer of the Deck. The courts have required that lookouts be: Experienced seamen; assigned no other duties while acting as lookouts; alert and vigilant. Always stationed to best observe, see, and hear the approach of other vessels; stationed in sufficient number to detect a vessel approaching from any direction; bearings of approaching vessels are observed.

The failure of a steamer to see a sailing vessel which she ought to have discovered, in time to give her sufficient room, is a fault rendering the steamer liable if it results from insufficient lookout. *The Belgenland* (1885), 29 L. Ed. 152. The excuse that a vessel is unable to determine, by reason of the darkness and the direction of the wind, from the lights of the

other vessel, on what course she is sailing, and which is the privileged vessel, cannot be invoked where, by reason of the inefficiency of her lookout, she failed to discover the approaching vessel until the two were in close proximity, and she had no time to study the situation. *The Queen Elizabeth,* 100 Fed. 874 (reversed on other grounds) 122 Fed. 406. A burdened vessel which fails, through the inexcusable absence of her lookout, to maintain it steadily, and thus causes a collision, is liable. *The Robert Graham Dun* (CCA 1895), 70 Fed. 270.

In the *Ariadne* (1872), 13 Wall. 475, the United States Supreme Court delivered the following requirements for a proper lookout in a case that arose out of a collision between a steamship and a brig outside New York Harbor on a foggy night:

> The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. . . . It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony to the contrary.

(iii) **Pearson Breached His Duty to Keep a Proper and Adequate Lookout and Violated the Standard of Care for Such Lookout.**

We need only apply the standards prescribed by the courts for keeping a proper and adequate lookout to the facts adduced at the trial to determine whether the finding of the trial court that Pearson did not keep an adequate lookout is supported by substantial evidence.

Who was specially charged with the duty of observing the lights, sounds, echoes, and obstructions to navigation with that thoroughness which the circumstances demanded? Pearson, the owner and master of his vessel, a experienced boater with a background of knowledge of the rules of navigation and a licensed seaman.

Appellee has abstracted the relevant facts pertaining to the collision in Appendix A attached hereto and made a part hereof. From the summary of Pearson's testimony it is submitted that Pearson was engaged during a period of two to five minutes before the collision in operating his vessel with the throttle almost idle; his head cocked at an unusual angle, his eyes sighting along the water searching in the glare cast by the illumination from the shore for a lost hat, and his mind preoccupied with the outline of the adjoining peninsula and the red light on his port side.

It is respectfully submitted that Pearson did not maintain a high degree of vigilance in the exercise of his duty as a lookout. Pearson did not use his eyes to see and his ears to hear; he was not properly stationed as a lookout; he had assigned himself to another duty which interfered with his function as a lookout, *i.e.*,

to circumnavigate idly about the waters of the Lake seeking to find a lost hat.

The fact that a vessel had no sufficient lookout is *prima facie* evidence that the collision was caused by fault on her part. *Beavers v. The North American* (DC NY), Fed. Cas. 1, 201. Pearson calls upon this court to overrule the finding of the trial court that Pearson had not kept an adequate lookout based upon a claim or conjecture that even if Pearson had in fact kept a proper lookout he either could not or would not have seen Heiser. Thus much of the testimony adduced by Pearson by experts called by him is devoted to establishing that one in Pearson's position could not, or should not have seen the lights on the Heiser boat.

Testimony in the nature of experiment must be regarded with great caution since of necessity the angles of approach of Heiser and Pearson immediately prior to the collision, the lines of sighting, the speeds of the two vessels, the angles of inclination at all times during the final approach preceding the collision and all of the variables which were necessarily unknown to the experts were not incorporated within the body of such experiments. Most critical of all, such expert testimony failed to concern itself with the lookout issue as to whether one in Pearson's position could have or should have in fact heard the 180 horse power gasoline engine on Heiser's 16 foot Chris Craft boat [Find. 4 admitted by the pretrial conference order]. At the time of the collision Pearson was barely moving or drifting. No testimony was adduced by Pearson to the effect

that his hearing was defective or there was any impediment which prevented his sensory organs, the ears, from receiving the vibrating and roaring noise which poured forth from the Heiser boat during the entire course of its run.

It is the duty of the lookout not only to see what there is to see but to hear what there is to hear, including the approach of other vessels. Pearson gives no explanation whatsoever of his failure as a lookout to hear Heiser's approaching boat. A vessel having no lookout has the burden of showing that the absence of a lookout did not contribute to the collision. *The San Simeon,* 1 F. Supp. 506 (1932), AMC 911 (affirmed) 63 F. 2d 798; 1933 AMC 489.

Two other points deserve mention. One, that Pearson had been up and awake since approximately 5:00 o'clock the morning of the day of the accident [Rep. Tr. p. 170, lines 11-18]. Second, that Heiser as he returned to the Pearson boat lost sight of Pearson's lights [Rep. Tr. p. 227, lines 6-16]; that Schonning, an occupant of the Heiser boat did not see the green light on Pearson's boat at any time following completion of Heiser's turn back toward the Pearson vessel [Rep. Tr. p. 278, lines 16-21] until just before the collision; that Cherback, an occupant in Heiser's boat, saw Pearson's red and green lights as the Heiser boat turned back toward the Pearson boat then saw the Pearson green light only from which Cherback concluded that the Pearson boat was turning [Rep. Tr. p. 305, line 19, to p. 307, line 1].

An inference may be drawn that Pearson's faculties were dulled; he had been up for 15, 16, or more hours; he was not fresh and rested, but was fatigued, and therefore could not in fact use the judgment necessary to maintain a proper and adequate lookout. Further inference may be drawn that while the Heiser boat was proceeding toward Perason's boat that even at such time and after Pearson had completed his second 180° turn that Pearson was still cruising in a pattern of search for a lost hat; such a circinating pattern that observers could not follow the direction of navigation by Pearson's navigational lights lending additional support to the thought that Person was indeed searching and cruising and looking for a lost hat and was not maintaining a proper lookout.

The finding of the trial court that Pearson did not keep an adequate lookout is supported by substantial evidence. There is no particular reason to follow the wild hare that Pearson has started that had he in fact been keeping a proper lookout he could not or would not have seen Heiser's lights. The hazard of such speculative endeavors should not overweigh the trial court's finding with respect to Pearson's failure to keep an adequate lookout. It is respectfully submitted that no contrary testimony has been introduced by Pearson which vindicates his failure to maintain a proper and adequate lookout; by reason whereof every doubt as to the performance of Pearson's duty and the effect of non-performance should be resolved in favor of appellee.

B. There Is No Competent Evidence to Support Pearson's Claim Based on Conjecture Coupled With Pearson's Denial That Even if He Had Kept a Proper Lookout and Could Have Seen or if in Fact He Had Seen Heiser That Pearson Could Have Taken Any Steps to Avoid the Collision.

In *The San Simeon, supra,* Circuit Judge Learned Hand held that the law throws upon a vessel which fails in her duty the chance of speculations as to what the other vessel would have done if she had fulfilled her duty. The court said at page 801:

> . . . The Commercial Mariner had probably been inattentive and had not heard the double blast; or had disregard it. She had only one officer on the bridge and no lookout forward. While we agree that a lookout will not keep reporting a vessel once seen, we are not advised that he would not report a subsequent signal. We hold the Commercial Mariner for failing to answer the double blast with an alarm. As to this fault, it is indeed true that the Commercial Mariner was not in doubt as to the San Simeon's intention, and, reading the rule literally, that is the only occasion for the danger signal. But a fortiori when the proposed navigation is plainly impracticable, the ship should blow. The Bergen (D. C.) 108 F. 555, affirmed 128 F. 920 (C.C.A. 2). It is indeed impossible to say that this would have changed the result, but the fault being a breach of the rule, the Commercial Mariner must satisfy any doubts. Such a sig-

> nal would have told the San Simeon that the Commercial Mariner thought her navigation dangerous; not being followed by a backing signal it ought to have told her that she was coming on. It is impossible to say what she would have done in this predicament, but it must have appeared to her that the Commercial Mariner did not mean to pass under her stern. It is quite possible that she would have slackened speed, as she did when the situation developed more completely. A very little change would have sufficed; the Commercial Mariner needed only about seven seconds to escape. Such speculations the law throws upon the vessel which fails in her duty. It seems to us enough to charge her. . . .

The Pearson vessel was 13 feet overall. [Find. 3 admitted at pretrial conference order]. It had an outboard motor and at idle it could pivot on the bow and even make a turn less than the length of the boat; it had just a small turning radius [Rep. Tr. p. 138, lines 5-13]. With such maneuverability and such faculty for avoidance of a collision quickness in response was at a premium and moments of delay were fatal. As in the *San Simeon, supra,* the collision was due not to any error of judgment on the part of Pearson *in extremis* since Pearson exercised no judgment whatsoever and took no action to avoid the collision but, it is respectfully submitted, was due to Pearson's failure to maintain a proper and adequate lookout.

C. As to Appellee Sandra Stamper the Major and Minor Fault Rule Properly Was Not Applied.

Counsel for appellant conceded the inapplicability of the Fault Rule during the trial:

> Mr. Sampson: . . . assuming you should find fault on the basis of both would we have a right to proceed against the one that is guilty of the lesser fault and collect from him and his only right would be for indemnity against the other wrongdoer.
>
> Mr. McHose: (counsel for appellant Pearson) I think that is true, as a matter of law, yes." [Rep. Tr. p. 105, line 23, to p. 106, line 7].

A third person such as Sandra Stamper who is injured in a collision occasioned by the fault of two or more vessels can proceed against the vessels jointly or against either separately and such innocent third party is insulated from the application of the Fault Rule which applies *inter se* between two vessels but not to the injured third party. In a proceeding against either vessel separately the libelant's recovery is not limited to one-half the damages but extends to the entire amount.

48 Am Jur, Shipping, Section 243;

The O'Brien Bros. (1919 CA 2 N.Y.), 258 Fed. 614; 63 A.L.R. 20, 343, 349;

The Hamilton, 146 Fed. 724, 77 C.C.A. 150. Affirmed, 207 U.S. 398, 28 S. Ct. 133, 53 L. Ed. 264;

The Michael Tracy, 43 F. 2d 965;

The Washington (The George Washington v. Cavan), 9 Wall. (U.S.) 513, 19 L. Ed. 787.

Thus, in the *Michael Tracy, supra,* L. Hand, Augustus Hand, and Chase, Circuit judges, held the Fault Rule inapplicable to innocent third parties. Judge Augustus Hand stated at page 967:

> The rights or liabilities of the Cape Cod do not determine the liability of the Michael Tracy. The former may have been at fault for having defective gear which had not been properly maintained or inspected, or she may have been without fault because a log disabled her rudder. In the first case the Cape Code could only recover half damages but in the second case the Michael Tracy would be solely liable. Likewise under the familiar doctrine in admiralty, if the fault of the Cape Code because she failed to act when she had plenty of time as well as space within which to navigate was very gross, the Michael Tracy although herself a wrongdoer, would not be liable to the Cape Cod when the opportunity of the latter to escape was so great. But in none of these cases would the Michael Tracy be free from wrongdoing or from liability as a tort-feasor to the innocent owner of the cargo whose right the libelants here represent. The Beaconsfield, 158 U S 303, 15 S. Ct. 860, 39 L. Ed. 993. Any excuse which she might have does not apply to them.

It is respectfully urged that no warrant exists in law for applying the Major & Minor Fault Rule to Sandra Stamper, an innocent third party, involved in the collision.

Conclusion.

Appellant has failed to comprehend the meaning and significance of a lookout. Far from being at minor fault, it is submitted that appellant was not less culpable than Heiser in tragic circumstances wherein three people lost their lives and one, Sandra Stamper, was seriously and permanently injured.

It is respectfully submitted that the findings of the trial court were supported by substantial evidence and that the interlocutory judgment with respect to liability should be affirmed.

Respectfully submitted,

CAIDIN, BLOOMGARDEN & KALMAN,
By NEWTON KALMAN,
Attorneys for Appellee Sandra Stamper.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

NEWTON KALMAN

APPENDIX A.

Summary of Pearson's Testimony.

1. As Pearson proceeded back across the Lake he could see the Black Meadow Landing; it was a mass of lights, a well lit area; he could see house trailer lights, street lights, store lights, car lights and "just lights in general." It was very easy to see from that relatively short distance [Rep. Tr. p. 40, line 19, to p. 41, line 7].

2. There was a red light on the Black Meadow peninsula which was visible from all the way across the Lake [Rep. Tr. p. 41, lines 10-24].

3. Pearson was ⅔rds to ¾ths across the Lake when Blaney called that he had lost his hat, whereupon Pearson pulled the throttle back and made a 180° turn [Rep. Tr. p. 48, lines 5-23].

4. As Pearson retraced his course he did so for a minute or two in time, with the throttle idle, moving probably 2-3 miles per hour [Rep. Tr. p. 49, lines 12-25].

5. After Pearson reduced his speed to 2-3 miles per hour he never again increased his speed at any time before the collision occurred [Rep. Tr. p. 50, line 22, to p. 51, line 2].

6. After Pearson returned to his course headed back to Black Meadow Landing he traveled about 1-2 minutes according to his best estimate up until the time of the collision, or at least a good many seconds, perhaps a minute [Rep. Tr. p. 51, lines 3-18].

7. Pearson was looking ahead and to the left and does not recall looking off to the right but was scanning from ahead of the boat back to the left and probably behind on the left, trying to get a sight of the

red light he knew was there [Rep. Tr. p. 52, lines 17-22; Rep. Tr. p. 59, line 23, to p. 60, line 8].

8. Pearson never saw any boat approaching his boat from the shore [Rep. Tr. p. 53, lines 1-3].

9. When Pearson started back to the Black Meadow Landing he was aware of a glare on the water from the camp area; he was looking down and was somewhat concerned about trying to find the hat [Rep. Tr. p. 54, lines 8-23].

10. Pearson was looking for the hat and was concerned with the point of land on his left and couldn't see where he was going, that was obvious, because of all the lights [Rep. Tr. p. 55, lines 8-13].

11. Pearson had not stopped looking for the hat at the time of the collision [Rep. Tr. p. 55, lines 15-17].

12. Pearson didn't know and couldn't tell the angle of the collision at the moment of collision. He never saw the Heiser boat until afterwards. He didn't remember seeing the boat or even hearing the noise of the impact of the crash which must have been considerable [Rep. Tr. p. 58, lines 11-25].

13. He could see the lights where he was headed, they were obvious but he couldn't see the light that he identified as the approaching boat [Rep. Tr. p. 60, lines 9-14].

14. In the area where the collision occurred there was a glare on the water and the lights in the general area where Pearson was headed was significant. The glare on the surface of the water was sufficient to assist in looking for any object floating on the water [Rep. Tr. p. 61, lines 6-20].

15. There were three boats in the area of the collision including Pearson's boat, Heiser's boat and another boat in a space of a few minutes [Rep. Tr. p. 83, lines 7-14].

16. Pearson's attention as he came back toward Black Meadow Landing was concentrated more on the left side of the boat because he was concerned about the piece of land that stuck out there [Rep. Tr. p. 84, lines 5-11; p. 85, lines 2-21].

17. He had no idea why he couldn't see Heiser [Rep. Tr. p. 84, lines 12-17].

18. As he made a second 180° turn to resume his course to the Black Meadow Landing he was still going slowly and still looking for the hat "in case we should run across it." As he was headed back toward Black Meadow Landing he was aware of other boats in the area [Rep. Tr. p. 86, lines 2-17].

19. In order to look for the hat he was holding his head down close to the water and sighting along looking for the glare [Rep. Tr. p. 86, line 23, to p. 87, line 23].

20. On the way back to the Black Meadow Landing at some point the Heiser boat passed the Pearson boat on the way back to the Landing. The distance separating the boats was approximately 50 feet [Rep. Tr. p. 127, lines 1-2].

21. Pearson did not instruct anybody in his boat to look for the hat or to look for other boats [Rep. Tr. p. 139, lines 8-13].

22. He continued to look for the hat. He was holding his head down and looking and there was a glow

from his bow lights. He was looking down and also looking along the water as well as looking down [Rep. Tr. p. 142, lines 6-24].

23. After the second 180° turn as he headed back toward Black Meadow Landing he proceeded on the course two minutes or more; considerably longer, the way "we were outbound" and never advanced the throttle [Rep. Tr. p. 144, lines 14-21].

24. It was a clear night, no fog or mist [Rep. Tr. p. 145, lines 12-17].

25. After making the 180° turn the second time he actually continued for more than twice two minutes. Actually he had no idea if it was 2 to 5 minutes because he was going so slowly [Rep. Tr. p. 146, lines 7-13].

26. He was concentrating more on the navigation of the boat and looking for other boats than he was looking for the hat because of his concern about going around [Rep. Tr. p. 146, lines 14-19].

27. He does not recall the impact noise. He had heard no noise from any engine [Rep. Tr. p. 147, lines 1-3].

28. He actually was familiar with the area and the flashing lights and the silhouette of the peninsula [Rep. Tr. p. 147, lines 16-22].

29. When he headed back toward Black Meadow Landing there was light on the water coming from lights on the shore and he used such lights in attempting to locate the hat [Rep. Tr. p. 159, lines 13-21].

30. When he made the second 180° turn and started back toward Black Meadow Landing he continued to devote a small amount of attention to looking for the hat and was primarily concerned about getting back to the landing [Rep. Tr. p. 164, line 23, to p. 165, line 4].

31. He had been up since 5:00 of the morning of the date of the accident [Rep. Tr. p. 170, lines 6-13].